

# FEDERAL CIRCUIT COURT OF AUSTRALIA

*MAGOMU v MINISTER FOR IMMIGRATION  
& ANOR*

[2018] FCCA 1290

## Catchwords:

MIGRATION – Review of Administrative Appeals Tribunal decision – refusal of a partner visa – Tribunal found no genuine and continuing spousal relationship – inconsistent evidence regarding Centrelink payments put to the applicant – Tribunal invited to make its own enquiries – whether the Tribunal was obliged to do so considered – no arguable case of jurisdictional error.

## Legislation:

*A New Tax System (Family Assistance) (Administration) Act 1999* (Cth), s.167  
*Federal Circuit Court Rules 2001* (Cth)  
*Freedom of Information Act 1982* (Cth)  
*Migration Act 1958* (Cth), ss.5F, 359A  
*Migration Regulations 1994* (Cth)  
*Social Security (Administration) Act 1999* (Cth), s.207

## Cases cited:

*He v Minister for Immigration* [2017] FCAFC 206  
*Minister for Immigration v SGLB* (2004) 207 ALR 12  
*Minister for Immigration v SZIAI* (2009) 259 ALR 429; 83 ALJR 1123  
*VCAK of 2002 v Minister for Immigration* [2004] FCA 459  
*SZOER v Minister for Immigration* [2010] FCA 1100

|                    |                                                 |
|--------------------|-------------------------------------------------|
| Applicant:         | ROGERS MAGOMU                                   |
| First Respondent:  | MINISTER FOR IMMIGRATION &<br>BORDER PROTECTION |
| Second Respondent: | ADMINISTRATIVE APPEALS<br>TRIBUNAL              |
| File Number:       | SYG 2239 of 2017                                |
| Judgment of:       | Judge Driver                                    |
| Hearing date:      | 21 May 2018                                     |
| Delivered at:      | Sydney                                          |

Delivered on:

21 May 2018

## **REPRESENTATION**

The Applicant appeared in person

Solicitors for the Respondent: Mr K Eskerie of Sparke Helmore

## **INTERLOCUTORY ORDERS**

- (1) The subpoena issued on 5 February 2018 to the Department of Human Services is set aside.
- (2) Pursuant to rule 44.12(1)(a) of the *Federal Circuit Court Rules 2001* (Cth), the application is dismissed.
- (3) The applicant is to pay the first respondent's costs and disbursements of and incidental to the application, fixed in the sum of \$3,667, in accordance with Item 2 of Division 1 of Part 3 of Schedule 1 to the *Federal Circuit Court Rules 2001* (Cth).
  - (i)
- (4)

**FEDERAL CIRCUIT COURT**

**OF AUSTRALIA**

**AT SYDNEY**

**SYG 2239 of 2017**

**ROGERS MAGOMU**

Applicant

And

**MINISTER FOR IMMIGRATION & BORDER PROTECTION**

First Respondent

**ADMINISTRATIVE APPEALS TRIBUNAL**

Second Respondent

## **REASONS FOR JUDGMENT**

**(revised from transcript)**

### **Introduction and background**

1. The applicant, Mr Rogers Magomu, seeks judicial review of a decision of the Administrative Appeals Tribunal (Tribunal) made on 22 June 2017. The Tribunal affirmed a decision of the delegate of the Minister (delegate) not to grant Mr Magomu a temporary partner visa.
2. Background facts relating to this matter are set out in the Minister's outline of submissions, filed on 14 May 2018.
3. Mr Magomu, a citizen of Uganda, arrived in Australia as the holder of a Special Program (subclass 416) visa. On 4 December 2013, Mr Magomu lodged an application for a combined partner (Temporary)

(class UK) (subclass 820) and partner (residence) (class BS) (subclass 801) visa<sup>1</sup> on the basis of his marriage to his sponsor, Ms Nakirijja, and was granted an associated bridging visa.

4. On 21 July 2016, the delegate refused to grant the partner visa.<sup>2</sup> On 23 June 2017, following a hearing on 22 June 2017, the Tribunal affirmed the decision under review.<sup>3</sup>

### **Tribunal's decision**

5. The Tribunal found that Mr Magomu and Ms Nakirijja were not credible witnesses.<sup>4</sup> This finding was based on what the Tribunal considered to be hesitant and vague evidence given by both witnesses and notable discrepancies in their evidence.<sup>5</sup> The discrepancies highlighted by the Tribunal may be summarised as follows:<sup>6</sup>
- a) Mr Magomu and Ms Nakirijja gave differing evidence as to their living situation. Mr Magomu gave oral evidence that he lived with Ms Nakirijja and a flatmate at a property in St Ann Street in Merrylands and that the flatmate moved out a few months later, with Mr Magomu and Ms Nakirijja later moving to a property in Desmond Street due to a dampness issue. By comparison, Ms Nakirijja gave oral evidence that the flatmate remained at the St Ann Street property after she and Mr Magomu had moved to the Desmond Street property and that there were no problems with dampness. Her evidence was that the couple moved for privacy and because Ms Nakirijja was expecting a child;
  - b) Mr Magomu and Ms Nakirijja gave inconsistent oral evidence regarding how the couple had celebrated their marriage;
  - c) Mr Magomu and Ms Nakirijja gave inconsistent oral evidence regarding the birth of Ms Nakirijja's child, Malik. Mr Magomu said he only visited Ms Nakirijja and Malik at the hospital as they were having relationship problems at the time. However, Ms

<sup>1</sup> Court Book (CB) 11, 97

<sup>2</sup> CB 97

<sup>3</sup> CB 267

<sup>4</sup> [13]

<sup>5</sup> [13]

<sup>6</sup> [30]

Nakirijja said Mr Magomu drove her to the hospital and waited outside the delivery suite; and

- d) Mr Magomu and Ms Nakirijja gave differing oral evidence regarding Ms Nakirijja's Centrelink payments. Mr Magomu said Ms Nakirijja was not in receipt of Centrelink payments due to his income. In contrast, Ms Nakirijja said she had notified Centrelink that the relationship had broken down and had yet to advise Centrelink of the couple's reconciliation; as such she was receiving the family tax benefit on the basis that she was single.

- 6. The Tribunal put these inconsistencies to Mr Magomu in writing pursuant to s.359A of the *Migration Act 1958* (Cth) (Migration Act).<sup>7</sup> In response to the s.359A letter, Mr Magomu's migration agent provided additional documents and submissions.
- 7. The Tribunal found that Mr Magomu's response, through his migration agent, did not adequately explain the discrepancies in the oral evidence.<sup>8</sup> The Tribunal did not accept that Ms Nakirijja was overcome with nerves and therefore unable to accurately recall details of the parties' relationship, nor that she misunderstood the Tribunal's questions regarding whether Mr Magomu had been at the hospital when Malik was born. As such, the Tribunal placed weight on the discrepancies in the parties' oral evidence.<sup>9</sup>
- 8. The Tribunal accepted that the parties were validly married as required by s.5F(2)(a) of the Migration Act.<sup>10</sup> The Tribunal found the parties did not have any joint assets or liabilities,<sup>11</sup> did not pool their resources or share day to day household expenditure.<sup>12</sup> It concluded that the evidence regarding the financial aspects of the relationship was not consistent with a genuine and continuing spousal relationship.<sup>13</sup>
- 9. The Tribunal considered the nature of the household. It found that the parties do not have joint responsibility for the care and support of

<sup>7</sup> CB 215

<sup>8</sup> [16]

<sup>9</sup> [16]

<sup>10</sup> [19]

<sup>11</sup> [20]

<sup>12</sup> [25]

<sup>13</sup> [25]

children.<sup>14</sup> It found that there was some evidence to support that the parties had shared the same address since their marriage.<sup>15</sup> It noted the parties' claim to share household chores and Mr Magomu's claim to do most of the grocery shopping, but noted that that evidence was not supported by the bank accounts.<sup>16</sup> It concluded that the evidence presented as to the nature of the parties' household was not consistent with them being in a genuine and continuing relationship.<sup>17</sup>

10. The Tribunal considered the social aspects of the relationship. It considered the "small number" of photographs of the parties at social occasions and found unconvincing Mr Magomu's evidence that they had a lot of photographs stored on a remote server but were unable to access them.<sup>18</sup> It found that while there was some social recognition of the parties' relationship, there was limited independent evidence to indicate that the relationship was recognised by Mr Magomu's family or more broadly in the community.<sup>19</sup>
11. The Tribunal placed weight on the evidence of Ms Nakirijja that she advised Centrelink in 2016 that the couple had separated, that she had not yet corrected that advice and that she was still receiving payments on the basis that she was single. The Tribunal asked Mr Magomu to provide supporting documentation from Centrelink regarding these payments. Mr Magomu advised the Tribunal after the hearing that Centrelink refused to provide this information. The Tribunal found that even if that was true, Centrelink would have sent Ms Nakirijja correspondence at regular intervals to explain how her payments were being calculated. The Tribunal recorded that in the absence of independent documentation, it did not accept that Mr Magomu's income from employment had ever been taken into account in calculating the rate of Ms Nakirijja's Centrelink payments.<sup>20</sup>
12. Considering the nature of the persons' commitment to each other, the Tribunal did not accept, on the basis of the evidence before it, that Mr

<sup>14</sup> [29]

<sup>15</sup> [26], [30]

<sup>16</sup> [29]

<sup>17</sup> [30]

<sup>18</sup> [31]

<sup>19</sup> [33]

<sup>20</sup> [32]

Magomu and Ms Nakirijja provided each other with emotional support or saw the relationship as long term.<sup>21</sup>

13. In light of the above findings, the Tribunal was not satisfied that at the time of the visa application and decision, the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others and that the relationship was genuine and continuing. The Tribunal was not satisfied that the parties lived together or did not live separately and apart on a permanent basis. As such, the Tribunal found that Mr Magomu did not meet the definition of spouse in s.5F(2)(b)-(d).<sup>22</sup> It accordingly found that Mr Magomu did not meet clause 820.211(2)(a) of Schedule 2 to the *Migration Regulations 1994* (Cth). It also recorded that there was no evidence that Mr Magomu met any of the alternative subclauses of clause 820.211.<sup>23</sup>
14. The Tribunal found that it was not necessary for it to consider whether the reasons submitted by Mr Magomu for waiver of the Schedule 3 criteria were compelling in light of its finding that Mr Magomu did not meet an essential criterion for the grant of the visa.<sup>24</sup>
15. The Tribunal therefore affirmed the decision not to grant Mr Magomu a partner (Temporary) (class UK) visa.

## The present proceedings

16. These proceedings began with a show cause application filed on 17 July 2017. Mr Magomu continues to rely upon that application. There is one ground with three sets of particulars in it:

*The decision of the second respondent (the Tribunal) was affected by jurisdictional error in that the Tribunal constructively failed to exercise its jurisdiction to review the applicant's claims by failing to make inquiries of Centrelink concerning the veracity of the applicant's claim that income from his employment was taken into account in calculating the rate of his wife's Centrelink payments.*

*Particulars*

<sup>21</sup> [40]

<sup>22</sup> [41]

<sup>23</sup> [42]

<sup>24</sup> [32]

- a. *In response to an invitation by the Tribunal to comment on information, the applicant provided a form signed by his wife authorising the Tribunal to make inquiries of Centrelink's records of her records in relation to her parenting payment, Centrelink having refused to provide hard copies of the information within the time provided by the invitation to comment letter.*
  - b. *The Tribunal did not make the inquiries of Centrelink which had been authorised by the wife, but nevertheless went on to find at [32] that "In the absence of any independent documentation, the Tribunal is not prepared to accept that Mr Magomu's income from employment has ever been taken into account in calculating the rate of (the wife's) Centrelink payments".*
  - c. *The applicant's claim that income from his employment had been taken into account in calculating the rate of his wife's Centrelink payments was critical to the Tribunal's consideration of whether the applicant and his wife were in a 'married relationship' as defined in s 5F(2), having regard to the matters set out in reg 1.15A(3).*
17. The application is supported by a short affidavit filed with it, which I received.
18. I also have before me as evidence the court book filed on 4 September 2017.
19. In an apparent effort to support his judicial review application, Mr Magomu caused a subpoena to be issued to the Department of Human Services (Department) on 5 February 2018. The subpoena sought information from the Department concerning Centrelink payments received by Ms Nakirijja.
20. The Department responded to the subpoena on 27 February 2018. The response is to the effect that s.207 of the *Social Security (Administration) Act 1999* (Cth) prohibited the Department from producing documents, collected or produced, for the purposes of the administration, in compliance with a summons, except for the express purposes of a social security law. Section 167 of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) is in similar terms. I have checked those pieces of legislation and confirmed that



the response to the subpoena was accurate. In the circumstances, I set aside the subpoena.

21. I note that the Department suggested to Mr Magomu, in its response to the subpoena, that he might wish to make an application under the *Freedom of Information Act 1982* (Cth). He has not done so. When I inquired why, he said, in effect, that there had not been sufficient time.
22. On the substance of the grounds advanced in the application, it is apparent from the material in the court book that Mr Magomu faced serious difficulties in relation to his partner visa application in view of conflicting information given to the Tribunal by him and his wife. Mr Magomu had told the Tribunal that his wife was not in receipt of Centrelink benefits. His wife, on the hand, told the Tribunal that she had informed Centrelink of her marriage in 2014, but in 2016, told Centrelink that she and Mr Magomu had separated and she was in receipt of a single person benefit.
23. Plainly, this conflicting information impacted adversely on the Tribunal's consideration of the visa application. The Tribunal properly drew this information to Mr Magomu's attention by letter, pursuant to s.359A of the Migration Act, and invited a response. The response was to the effect that Mr Magomu and his wife had been unable to obtain information from Centrelink, but they invited the Tribunal to do so by using a partially completed form they provided.
24. I agree with the Minister that the circumstances did not give rise to any legal obligation upon the Tribunal to take up the invitation which had been made to it. The Minister's Department was entitled to rely upon the evidence given by Mr Magomu's wife concerning her advice to Centrelink in 2016 that she and Mr Magomu had separated and her receipt, apparently thereafter, of a single person benefit. Further, the Tribunal was entitled to take that information into account, both in assessing the credibility of the parties and the aspects of the relationship.
25. In other respects, I agree with the Minister's submissions in relation to the ground of review advanced by Mr Magomu.

26. The Tribunal found that in the absence of independent documentation, it could not accept that Mr Magomu's income from employment had ever been taken into account in calculating the rate of Ms Nakirijja's Centrelink payments.<sup>25</sup> If the Tribunal could not be satisfied on the basis of the material presented that Mr Magomu's claims were genuine, it did not have a duty to make further inquiries.<sup>26</sup>
27. It is well established that the sections in the Migration Act that enable the Tribunal to obtain information are permissive, not mandatory. The fact that the Tribunal did not use such enabling provisions does not indicate an error of law.<sup>27</sup>
28. While there are limited circumstances where material before the Tribunal may establish a duty to make an inquiry about a critical fact the existence of which could be easily ascertained,<sup>28</sup> there were no such circumstances in the present case. Whether Mr Magomu's wages were considered by Centrelink was one of several factors considered by the Tribunal as to the aspects of the relationship, which in itself was one of several considerations taken into account by the Tribunal. Neither could the Tribunal have confidence that whatever response it received from Centrelink, had it submitted the form provided, would be determinative of any issue in the review.
29. It was a matter for Mr Magomu to provide evidence to make out his case before the Tribunal. The Tribunal received and considered oral evidence on the issue from both Mr Magomu and Ms Nakirijja and gave Mr Magomu an opportunity to provide further documentary evidence. Mr Magomu failed to provide corroborating evidence in support of his assertions, despite being granted an extension of time. It was open to the Tribunal not to accept the assertion that Mr Magomu's inability to provide the evidence was due to Centrelink's refusal to furnish it, and to infer that Centrelink would have sent Ms Nakirijja information about her payments if she had requested it herself. In the

<sup>25</sup> [32]

<sup>26</sup> *Minister for Immigration v SZIAI* (2009) 259 ALR 429; 83 ALJR 1123; *Minister for Immigration v SGLB* (2004) 207 ALR 12 at [17], [19], [43] and [124]

<sup>27</sup> *VCAK of 2002 v Minister for Immigration* [2004] FCA 459 at [27]–[28]

<sup>28</sup> *SZIAI* at [25]–[26]. See also *SZOER v Minister for Immigration* [2010] FCA 1100 per Cowdroy J

circumstances, the Tribunal's approach to this issue cannot be said to be legally unreasonable, or otherwise to constitute a jurisdictional error.

30. Accordingly, Ground 1 must fail.
31. I note that the Minister raised an additional matter in [23] to [25] of the Minister's submissions. That was done in conformity with the Minister's obligations as a model litigant and I accept the submissions made therein.
32. Whilst not expressly raised by Mr Magomu, the Minister considers it appropriate to address the decision of the Full Federal Court in *He v Minister for Immigration*.<sup>29</sup> In *He*, the Full Court held that the Tribunal was required to make findings on each of the principal matters set out in sub-regulation 1.15A(3)(a)-(d) as well as the matters prescribed in Roman numerals in each of the subsections. However, the Full Court at [82] also said:

*The Tribunal's reasons were not structured in a manner that formulaically addressed each of the relevant matters in turn, but they did not have to be: see Zhang at [20]. Further, as Charlesworth J said in Singh at [20], the impressionistic and evaluative nature of the Tribunal's task must be taken into account when drawing implications from its reasons, and, further, such reasons are not to be construed minutely and finely with an eye attuned to the perception of error.*

33. The Full Court found in *He* that the Tribunal had not made express findings in relation to all relevant matters enumerated in regulation 1.15A(3). Nevertheless the Full Court dismissed the appeal because the Court was satisfied by inference that the Tribunal had made the necessary findings.
34. In the present case, having cited, and annexed to its decision a copy of, regulation 1.15A(3), the Tribunal proceeded to address each of the relevant matters in regulation 1.15A(3). The Minister submits and I accept that on a fair reading of the Tribunal's decision, it is apparent that the Tribunal considered and made findings on each of matters set out in regulation 1.15A(3), including those set out in the Roman numerals.

<sup>29</sup>[2017] FCAFC 206

## Conclusion

35. I conclude that Mr Magomu is unable to demonstrate an arguable case of jurisdictional error by the Tribunal. I will, therefore, order that the application be dismissed pursuant to rule 44.12(1)(a) of the *Federal Circuit Court Rules 2001* (Cth) (Federal Circuit Court Rules).
36. In consequence of the dismissal of the application, the Minister seeks an order for costs in accordance with the court scale. Mr Magomu indicated that he understood the issue of costs.
37. I will order that the applicant pay the first respondent's costs and disbursements of and incidental to the application, fixed in the sum of \$3,667, in accordance with Item 2 of Division 1 of Part 3 of Schedule 1 to the Federal Circuit Court Rules.

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**I certify that the preceding thirty-seven (37) paragraphs are a true copy of the reasons for judgment of Judge Driver**

Date: 24 May 2018